RECORD
AND
BRIEF.

No. 16-348

In the Supreme Court of the United States

MIDLAND FUNDING, LLC, PETITIONER

v.

ALEIDA JOHNSON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent's brief is long on policy arguments about the practice of filing proofs of claim for time-barred debt in bankruptcy proceedings. But it is conspicuously short on arguments about whether that practice contravenes the actual language of the Fair Debt Collection Practices Act. Tellingly, respondent devotes a substantial portion of her brief to the quixotic argument that the Bankruptcy Code does not permit the practice of filing proofs of claim for time-barred debt—an argument that no court of appeals, even the court below, has accepted.

Respondent's real complaint, however, is not that debt collectors are violating the Code, but that the system es-

tablished by the Code is not operating as Congress intended, supposedly because of the transaction costs of objecting to claims. But even if that is true—and there is good reason to believe it is not, especially given the benefits of bringing time-barred debts into the bankruptcy process—that is at most a problem of bankruptcy administration. And the solution to any such problem is for Congress or the Advisory Committee to fix the system—not for this Court to distort the FDCPA, a statute never meant to apply in bankruptcy proceedings.

There is nothing false or misleading, or unfair or unconscionable, about the filing of a proof of claim for a time-barred debt, which affirmatively puts parties in interest on notice about the existence of a potential limitations defense. Neither the Code nor the Rules require creditors to go further and certify that there is no valid limitations defense to their claims. Yet that is precisely what respondent is asking this Court to do under the guise of interpreting the FDCPA. And respondent does not dispute that such an interpretation would unleash a wave of court-clogging, lawyer-driven FDCPA litigation—mostly in cases, like this one, where the plaintiff has suffered no actual injury (and thus lacks Article III standing).

Respondent asks this Court to back into her preferred interpretation of the FDCPA by holding that certain practices *outside* bankruptcy would violate the statute and would even be sanctionable. But that approach would require the Court to bite off far more than it agreed to chew when it granted certiorari on the bankruptcy-specific questions presented here. All the Court needs to do in this case is to hold that, whatever the propriety of certain practices outside bankruptcy, there is nothing improper about engaging in a practice that the Code specifically invites. Alone among the circuits, the Eleventh Circuit has held that filing an accurate proof of claim for a time-

barred debt in a bankruptcy proceeding violates the FDCPA. That holding was erroneous, and the judgment below should therefore be reversed.

A. The Bankruptcy Code Creates A Right To File A Proof Of Claim For An Unextinguished Time-Barred Debt In A Bankruptcy Proceeding

1. Respondent contends (Br. 38-49) that the Bankruptcy Code does not permit any creditor (whether a debt collector or not) to file a proof of claim for an unextinguished time-barred debt. Even the Eleventh Circuit—the sole circuit to rule in respondent's direction on the questions presented—rejected that contention. See Pet. App. 8a-9a. This Court should reject it as well.

a. Respondent contends that a "claim" encompasses only an "enforceable" right to payment. See, *e.g.*, Br. 39. But the Bankruptcy Code defines a "claim" simply as a "right to payment," with no additional limitation to "enforceable" rights. 11 U.S.C. 101(5)(A). Taken on its terms, moreover, such a limitation is as illogical as it is atextual. The Code cannot be interpreted to reach only claims that are "enforceable"—that is, claims that could ultimately be enforced in a civil action—because that would exclude "disputed" claims that turn out to be losing ones, or "contingent" claims where the contingency never materializes. See *ibid.* The Code also provides that a "claim" should be *disallowed* if it is "unenforceable." See 11 U.S.C. 502(b)(1). Yet under the foregoing interpretation, a claim that is "unenforceable" would not be a "claim" in the first place.

Faced with these obvious problems, respondent offers a carefully engineered variation on its interpretation: the term "claim" excludes, as "unenforceable," only "knowingly invalid" claims, Br. 43 (emphasis omitted)—presumably meaning claims subject to a defense the creditor believes to be valid at the time it files its proof of claim. As

a preliminary matter, that interpretation is even more divorced from the Code's actual text, which, again, defines a "claim" to encompass every "right to payment." See p. 3, *supra*.

More fundamentally, that interpretation would subvert the Code's operation by requiring a creditor to make a pre-filing assessment both of the potential defenses to a claim and of the claim's ultimate allowability. The Code deems a claim presumptively valid absent an objection; the trustee and other parties in interest bear the burden of investigating the defense and objecting as needed. See 11 U.S.C. 502(a). For that reason, it is incorrect to characterize the claims-allowance process as "reserved for *enforceable* claims," Br. 25: the Code does not exclude "unenforceable" claims at the outset, but rather sets up a process with a burden-shifting framework for evaluating (and, where appropriate, disallowing) claims.

b. With specific regard to limitations defenses, respondent seeks to read into the Code a requirement that the Advisory Committee expressly declined to impose in the Bankruptcy Rules. As to the type of debt at issue here, the Advisory Committee required a creditor to provide certain factual information that puts parties in interest on notice as to the existence of a potential limitations defense. See Fed. R. Bankr. P. 3001(c)(3)(A). In so doing, the Advisory Committee considered and rejected a proposed rule that would have gone further, requiring a creditor to certify that there is no valid defense under the applicable statute of limitations. See *Agenda Book for the Meeting of the Advisory Committee on Bankruptcy Rules* 86 (Mar. 26-27, 2009) (*Agenda Book*) <tinyurl.com/2009-agenda>. Critically, that is the very certification that respondent asserts is implicit in every proof of claim.

Unable to reconcile its proposed interpretation with that history, respondent resorts to mischaracterizing the

Advisory Committee's work. Respondent first contends that the Advisory Committee was concerned only about the category of cases in which "creditors were genuinely unsure about the timeliness of a claim." Br. 25. But the committee notes belie that contention: in the very case that precipitated the Advisory Committee's consideration of the issue, two bulk debt purchasers filed proofs of claim; the debtor objected on timeliness grounds; and the debt buyers withdrew their claims instead of defending them. See *Agenda Book* 79-80.

Respondent further contends that the Advisory Committee expected creditors to "conduct a good-faith inquiry" as to timeliness. Br. 25. That gets it exactly backward. The Committee's working group observed that, *if* it went further and required a certification from a creditor, it would be imposing an affirmative obligation on the creditor to engage in a pre-filing investigation of any potential limitations defense. See *Agenda Book* 86. The working group refused to do so, expressing concern that placing the "initial burden" with the creditor "to make sure it was not filing a stale claim" would depart from the Code's burden-shifting framework and could thereby violate the Bankruptcy Rules Enabling Act. *Ibid.* The working group further recognized that placing such a burden on the creditor could be unfair, given that "there are too many factors involved" in the application of a limitations defense for a creditor to certify with assurance that no valid defense exists. *Ibid.*

Respondent laments (Br. 45-46) that, unless this Court adopts her interpretation of "claim," some claims for time-barred debts will be allowed. But Congress evidently did not share that concern; it surely knew that some claims would be allowed, because the statute of limitations remains an affirmative defense in bankruptcy that is forfeited if not raised. When Congress wanted to ensure that

a creditor did not recover on a claim regardless of whether another party in interest objected, it eliminated the presumption of validity and allowed the bankruptcy court to disallow the claim *sua sponte*. See 11 U.S.C. 502(d), (e)(1). Even for such claims, moreover, Congress did not impose any restrictions on the creditor's ability to file a proof of claim in the first place. See *ibid.* That underscores Congress's intent to sweep all debts into the bankruptcy process. See Pet. Br. 23-25, 45.

2. Respondent's argument is built on the assumption that, at least as to a limitations defense, it will be easy for a creditor to determine that a claim is "*indisputably invalid*." Br. 42. That assumption is incorrect.

As the Advisory Committee noted, there are many factors that go into determining whether a claim for a seemingly time-barred debt is ultimately subject to a limitations defense. See *Minutes for the Meeting of the Advisory Committee on Bankruptcy Rules* 9 (Mar. 26-27, 2009) <tinyurl.com/2009minutes>; Chamber of Commerce Br. 12-15; NACTT Br. 14-15. For example, the evaluation of a limitations defense often requires a threshold choice-of-law analysis, including consideration of any choice-of-law provision in the underlying credit agreement. Cf. Fed. R. Bankr. P. 3001(c)(3)(B) (requiring that the credit agreement be sent on request to any party in interest). The length of the limitations period may depend on the characterization of the debt under applicable state law. See, *e.g.*, Ala. Code §§ 6-2-34, 6-2-37. And additional questions must be resolved to determine whether the limitations period has in fact run, such as whether the period was restarted by the debtor's actions or whether the period was tolled. See, *e.g.*, Ala. Code § 6-2-16.

As a result, while it is easy to spot a *potential* limitations issue with the information a creditor must provide under Rule 3001, it is hard to say with certainty whether

a limitations defense actually applies. Accordingly, the Code and the Rules provide a procedure for resolving limitations issues, with the creditor supplying sufficient information to put parties in interest on notice as to the existence of a potential limitations defense, but any objecting party bearing both the initial burden of raising such a defense and the ultimate burden of proving that it applies (and that the claim should therefore be disallowed).

Respondent contends (Br. 16 n.26) that, at least in this case, petitioner knew that there was a valid limitations defense. But no record was developed on that issue in the prior proceedings before the bankruptcy court. Respondent suggests that such knowledge can be inferred from the fact that petitioner did not defend its claim against respondent's discrete objection that the claim lacked supporting documentation. Given the low value of their claims, however, "[m]ost" creditors do not incur the "cost and time of responding" to objections. 1 Rosemary E. Williams, *Bankruptcy Practice Handbook* § 7:64, at 7-170 (2d ed. 2016); 2 *id.* § 8:136, at 8-639. That was presumably what happened here, because (as respondent concedes, see Br. 16 n.26) petitioner's claim should not have been disallowed solely on the asserted ground. See J.A. 21. While the claim appeared to be time-barred, the record does not indicate whether there was some other reason that a limitations defense would not apply.

3. Beyond her effort to read an atextual limitation into the definition of "claim," respondent does not dispute that petitioner has a "right to payment" under the Code. See Br. 38-44. That is for good reason, because Alabama law establishes that a creditor holding a time-barred debt retains a "right" to payment even if the limitations period potentially extinguishes the creditor's judicial remedy. See Pet. Br. 17 (citing cases). And as respondent seemingly concedes (Br. 41), this Court has made clear that a

"right to payment" exists where the underlying right is recognized under state law. See, *e.g.*, *Butner* v. *United States*, 440 U.S. 48, 54-55 (1979).

For its part, the government offers one additional argument. Relying on legislative history, the government contends that, notwithstanding its expansive definition of "claim," the Code creates a right to file a claim only where "*some purpose would be served.*" Br. 23 (citations omitted). But the reports the government cites do not support such a limitation. Instead, they note only that a creditor is not *obligated* to file a proof of claim, and that doing so "may simply not be necessary" in certain situations, such as when a claim has already been listed on the debtor's schedule or when there would be no distribution to the creditor even if the claim were allowed. See, *e.g.*, S. Rep. No. 989, 95th Cong., 2d Sess. 61 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 351 (1977). Here, neither of those circumstances applied, and the proof of claim thus served to bring respondent's debt within the bankruptcy process (even if the claim was ultimately disallowed). That was wholly consistent with Congress's overall goal of expanding the definition of "claim" and thus the comprehensiveness of the claims process.

4. Respondent does not seriously dispute that her interpretation of "claim" would limit the benefits to debtors of the Code's automatic-stay and discharge provisions. See Br. 44 n.39. Perhaps for that reason, respondent offers a fallback argument: even if "claim" is defined to include time-barred debts, she argues, this Court could require a creditor to have a "good-faith basis" (presumably, a belief that there are no valid defenses) before filing a proof of claim. *Ibid.* But that argument ignores the fundamental principle that any creditor—which includes any "entity that has a claim against the debtor," 11 U.S.C. 101(10)(A)—"is entitled to file a proof of claim." *Travelers*

Casualty & Surety Co. v. *Pacific Gas & Electric Co.*, 549 U.S. 443, 449 (2007). And it is hard to square with the Code's burden-shifting framework, which places the burden of assessing a potential limitations defense not on the creditor, but on the trustee and other parties in interest. See 11 U.S.C. 502(a).

As to the automatic-stay and discharge provisions, respondent contends that "[a] debtor does not need a fresh start from time-barred debts; the *time-bar itself* provides the fresh start." Br. 46-47. Not so. A creditor holding a time-barred debt may still take certain actions to collect on the debt. See Pet. Br. 24-25, 34. And while it is theoretically true that a debtor could notify a debt collector in writing that he does not wish to be contacted further, see 15 U.S.C. 1692c(c), only a debtor aware of his rights would invoke that provision, and it provides less expansive protection than the Code (which prohibits any "act to collect" by debt collectors and other entities alike, both during bankruptcy and after). 11 U.S.C. 362(a)(6), 524(a)(2).

5. Reasoning backward, respondent contends (Br. 48-49) that filing a proof of claim for an unextinguished time-barred debt would warrant sanctions and is therefore not permitted under the Bankruptcy Code. Respondent cites *In re Sekema*, 523 B.R. 651 (Bankr. N.D. Ind. 2015), for that proposition. That is the only published decision of which we are aware, however, in which a bankruptcy court has imposed sanctions under Bankruptcy Rule 9011 for filing a proof of claim for an unextinguished time-barred debt. Bankruptcy courts have overwhelmingly held that filing such a proof of claim is *not* sanctionable. See, *e.g.*, *In re Freeman*, 540 B.R. 129, 144 (Bankr. E.D. Pa. 2015); *In re Jenkins*, 538 B.R. 129, 135-136 (Bankr. N.D. Ala. 2015); *In re Keeler*, 440 B.R. 354, 366-368 (Bankr. E.D. Pa. 2009); *In re Andrews*, 394 B.R. 384, 387-388 (Bankr. E.D.N.C. 2008); *In re Varona*, 388 B.R.

705, 723-724 (Bankr. E.D. Va. 2008). Regardless of whether sanctions would be available under Civil Rule 11 for filing a *lawsuit* for a time-barred debt—a dubious proposition that would put the burden on civil plaintiffs to identify and assess affirmative defenses before filing suit[1]—the better view is that sanctions are not available under Rule 9011 in bankruptcy proceedings, where, under the governing substantive law, creditors unambiguously do not bear that burden. See p. 4, *supra*.

Even if filing a proof of claim for a time-barred debt could be sanctionable under Rule 9011, it does not follow that an FDCPA action lies for that conduct. To the contrary, the potential availability of sanctions indicates that the bankruptcy process is well equipped to deal with abusive conduct, and to do so in a calibrated way that accounts for the realities of the bankruptcy context and that applies to all creditors acting abusively (not just the subset of creditors reachable under the FDCPA). There is no valid justification to extend an entirely discrete cause of action from outside bankruptcy to address that concern.

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[1] Respondent cites three lower-court decisions for the proposition that sanctions would be available for filing a lawsuit in the face of an "obvious" affirmative defense under Rule 11. See Br. 48. But there is no consensus that it is improper litigation conduct to initiate a lawsuit in the face of an "obvious" defense (whatever that means)—even assuming Rule 11 could impose such a restriction consistent with the Rules Enabling Act. See, *e.g.*, *Ford* v. *Temple Hospital*, 790 F.2d 342, 348-349 (3d Cir. 1986); see generally David H. Taylor, *Filing With Your Fingers Crossed: Should a Party Be Sanctioned for Filing a Claim to Which There Is a Dispositive, Yet Waivable, Affirmative Defense?*, 47 Syracuse L. Rev. 1037, 1043-1050, 1052-1056 (1997). Indeed, in the specific context of limitations defenses, "it appears to be settled * * * that it is not ethically improper for a lawyer to pursue a claim in the hope that the other side will miss a statute of limitations defense." Douglas R. Richmond, Brian S. Faughnan & Michael L. Matula, *Professional Responsibility in Litigation* 17 (2d ed. 2016).

B. The FDCPA Does Not Prohibit Filing A Proof Of Claim For An Unextinguished Time-Barred Debt In A Bankruptcy Proceeding

In the section of her brief devoted to the FDCPA (Br. 21-38), respondent makes virtually no effort to demonstrate that filing a proof of claim for an unextinguished time-barred debt actually falls within the language of the relevant FDCPA provisions. Instead, respondent primarily contends that it would be bad policy to permit such filings. The FDCPA, however, is not an all-purpose tool for correcting perceived failings of the bankruptcy system. The relevant FDCPA provisions bar specific actions: using "any false, deceptive, or misleading representation or means in connection with the collection of any debt," 15 U.S.C. 1692e, or using "unfair or unconscionable means to collect or attempt to collect any debt," 15 U.S.C. 1692f. Filing a proof of claim for a time-barred debt does not violate either of those prohibitions.

1. a. As to Section 1692e: respondent cannot make out a claim under that section because all of the representations in petitioner's proof of claim—concerning the specific facts about the debt and the existence of a right to payment under Alabama law—were entirely accurate. See *Sheriff* v. *Gillie*, 136 S. Ct. 1594, 1600-1601 (2016); pp. 7-8, *supra*. Even respondent concedes that petitioner's proof of claim "accurately stated the relevant facts." Br. 24 n.28; see Resp. Cert. Br. 6 n.4.

Relegating *Sheriff* to a footnote, respondent suggests that the proof of claim was misleading because it implicitly represented that petitioner's claim was "valid and enforceable." Br. 26 n.29. As discussed above, however, petitioner's proof of claim in no way implied anything about "enforceability" generally or the absence of a limitations defense specifically; to the contrary, it affirmatively disclosed facts that put parties on notice as to the potential

existence of such a defense. See pp. 3-4, *supra*.[2] As the name suggests, a proof of claim represents only that the claimant has a claim—that is, a "right to payment" that may be unenforceable for any number of reasons (including because it is subject to a limitations defense). See 11 U.S.C. 101(5)(A), 502(b)(1), 558. Again, respondent is seeking, this time through the FDCPA, effectively to impose the requirement that the Advisory Committee considered and rejected: namely, that filing a proof of claim carries with it a certification that there is no valid limitations defense. See pp. 4-5, *supra*.

Respondent further asserts that the proof of claim was misleading because it "cloak[ed] the claim with presumptions of 'validity.'" Br. 26. But respondent's real beef is with the Code, not with petitioner's proof of claim: it is the Code that "cloak[s]" most claims subject to legal defenses with presumptive validity, while choosing to make certain types of claims automatically disallowed. See p. 6, *supra*. That presumption does not mean that the claim is

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[2] Respondent's brief is shot through with the assertion that petitioner "knew" there was a valid limitations defense to its claim. As a preliminary matter, it is unclear why that matters under respondent's theory, because the defendant's state of mind is not an element of liability under Section 1692e or Section 1692f. Cf. 15 U.S.C. 1692k(c) (providing an affirmative defense where a violation "was not intentional and resulted from a bona fide error"). In any event, respondent's primary basis for her assertion is that petitioner was aware of the very facts that it disclosed in its proof of claim. See Br. 31-32; cf. J.A. 25 (alleging, in complaint, only that the claim was barred "on its face" based on the date of the last transaction). But respondent cannot have it both ways: if it was obvious to petitioner from those facts that there was a valid limitations defense (in fact, it was obvious only that there was a *potential* limitations issue, see pp. 6-7, *supra*), it should have been obvious to everyone else too, because those facts were all disclosed.

automatically allowed; instead, it simply assigns the burden of proof to objecting parties, reflecting Congress's policy choice as to what should happen absent any objection. See 11 U.S.C. 502(a). Respondent may prefer a different substantive regime, but it hardly follows that petitioner's proof of claim was somehow misleading.

b. Because petitioner's proof of claim was accurate by any standard, this Court need not decide whose perspective is relevant in adjudging a potentially false or misleading statement. See *Sheriff*, 136 S. Ct. at 1602 n.6. To the extent the Court reaches that question, however, the applicable standard confirms that petitioner did not violate Section 1692e.

Respondent urges this Court to adopt an "unsophisticated consumer" standard, on the ground that the claims-allowance process "often relies on consumer debtors as the ultimate backstop." Br. 27. That is entirely incorrect. For that purpose, the Code relies on *trustees*, who are obligated to "examine proofs of claims and object to the allowance of any claim that is improper" as long as "a purpose would be served," 11 U.S.C. 704(a)(5)—that is, unless "there will be no distributions to creditors" or the claim otherwise would have "no effect." 9 *Collier on Bankruptcy* ¶ 4002.05[2], at 4002-11 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2016). And little wonder, for a proof of claim is filed against the *estate*, not against the debtor. See Pet. Br. 32-33; Resurgent Br. 8-10. That is why creditors submit proofs of claim to the bankruptcy court, not to the debtor; indeed, the Bankruptcy Rules do not require that the debtor even be served. See Fed. R. Bankr. P. 3001. The primary target audience for a proof of claim is thus the trustee, the party responsible for supervising the estate's distribution and the only one with a statutory obligation to examine the claim. See 11 U.S.C. 704(a)(5). It is irrelevant whether the debtor *also* sees the

proof of claim in some instances; an objection by the trustee (or any other party in interest) is sufficient for the claim to be disallowed. See 11 U.S.C. 502(a).

In addition, the debtor in this case was represented by counsel; indeed, respondent's attorney filed an objection to the proof of claim. See J.A. 20-22. An "unsophisticated consumer" standard would thus be particularly inappropriate here. In arguing to the contrary, respondent urges the Court to ignore the actual facts of this case in light of the "private-attorney-general function" of the FDCPA. Br. 28-29. But the intended recipient of a communication should obviously drive the choice of standard for evaluating whether the communication is false or misleading. In any event, the facts here are representative: there is a trustee in every case, and the debtor is represented by counsel in over 90% of cases nationwide (even if the rate in a given district may be lower, see Resp. Br. 6 n.7).

2. a. As to 15 U.S.C. 1692f: respondent's sole contention is that the filing of a proof of claim for a time-barred debt must be "unfair" or "unconscionable" because it constitutes a "flagrant misuse of the bankruptcy process." Br. 29. Respondent asserts that Congress never intended for any funds from the estate to go toward time-barred debts. See *ibid.* Again, that may be respondent's preference, but it was not Congress's: Congress chose to imbue such claims with a presumption of validity, thus ensuring that, absent objection, they would be permitted. See pp. 5-6, *supra*.

Respondent does not explain how conduct that the Bankruptcy Code affirmatively invites could be unfair or unconscionable. Indeed, at points in her brief, respondent seemingly concedes that the Code permits creditors to file proofs of claim for time-barred debts, but instead argues that the system does not operate as Congress intended

because of the transaction costs of objecting to those claims. See, *e.g.*, Br. 29-31.

As a preliminary matter, respondent exaggerates the burdens associated with filing objections. The objection process is "simple," and the costs associated with objecting are "not substantial." *Owens* v. *LVNV Funding, LLC*, 832 F.3d 726, 736 n.9 (7th Cir. 2016), petition for cert. pending, No. 16-315 (filed Aug. 26, 2016). Whereas a proof of claim must include specific information, an objection need only be in writing. See Fed. R. Bankr. P. 3001, 3007. Nor is respondent correct that the court must hold a hearing in order to resolve an objection; indeed, respondent's own objection was granted without one. See 11 U.S.C. 102(1)(B); *In re Pierce*, 435 F.3d 891, 892 (8th Cir. 2006); J.A. 9-10, 20-21.

Even if some claims are allowed that would be disallowed in a world without transaction costs, moreover, there is nothing improper about a creditor getting paid on a time-barred debt. After all, a creditor has a right to payment on such a claim, and it is entitled to take certain actions outside bankruptcy in an effort to collect on the debt. See p. 9, *supra*. While a valid limitations defense may limit the available options for enforcement, it does not automatically render any effort to collect on the debt unfair or unconscionable.

In addition, whatever the transaction costs associated with objecting to claims for time-barred debts more generally, respondent does not dispute that the process worked exactly as it should have in this case—without any identifiable burden on respondent. Petitioner filed its proof of claim, bringing into the bankruptcy process a debt that respondent had failed to list in her schedule. See J.A. 12-19. After respondent's attorney filed a one-sen-

tence objection, the claim was disallowed without any additional effort from respondent or the trustee. See J.A. 10, 21.

b. Even assuming, *arguendo*, that a substantial number of claims for debts with valid limitations defenses are in fact allowed—an empirical proposition respondent does not attempt to establish—that is at most a problem of bankruptcy administration. Respondent does not dispute that the Code provides a mechanism for raising and resolving objections to claims for time-barred debts. If the system is not operating as Congress intended, the solution is for Congress or the Advisory Committee either to address any administrative difficulties (say, by providing additional funding to trustees) or to alter the system (say, by amending the statute or rules for processing such claims). The solution is decidedly not to use the blunt instrument of the FDCPA—a statute never meant to apply in bankruptcy proceedings—to address perceived challenges in bankruptcy administration. Such challenges should be addressed by those familiar with the intricacies and practical realities of bankruptcy, rather than through court-clogging, lawyer-driven FDCPA suits.

3. Again reasoning backward, respondent contends (Br. 32-37) that, because filing a civil action in state court on an unextinguished time-barred debt would violate the FDCPA, filing a proof of claim for such a debt must do so as well. But this Court has not tackled the broader question whether filing a civil action on a time-barred debt would violate the FDCPA, and it need not do so here. While respondent creates the impression that it is settled law in the lower courts that filing a civil action would violate the FDCPA, we are not aware of any court of appeals that has actually so held in a case squarely presenting the question. Instead, the cases respondent cites appear to assume, without independent analysis, that filing such a

suit presents an FDCPA problem. See Br. 32-33. And to the extent those cases assume that the filing is false or misleading under Section 1692e, they are difficult to square with this Court's subsequent decision in *Sheriff*.

Even assuming that filing a civil action in state court would be unfair or unconscionable under Section 1692f, it does not follow that filing a proof of claim in bankruptcy would be as well. Whereas a civil action is directed at a (likely unrepresented) debtor, a proof of claim is directed at the bankruptcy estate: the creditor is making a claim against the estate's assets, and allowance of the claim will ordinarily have no impact on the debtor. See Pet. Br. 32, 35-36.[3] In addition, the procedures set out by the Code and the Rules, including the disclosures required by Rule 3001, make it much easier for the trustee, other creditors, or the debtor to identify and raise a timeliness objection. See *id.* at 31-32. For those reasons, every court of appeals to have considered the question (except for the court below) has concluded that, even if filing a civil action in state court would violate the FDCPA, filing a proof of claim in bankruptcy does not. See *In re Dubois*, 834 F.3d 522, 530-533 (4th Cir. 2016), petition for cert. pending, No. 16-707 (filed Nov. 23, 2016); *Owens*, 832 F.3d at 734-737; *Nelson* v. *Midland Credit Management, Inc.*, 828 F.3d 749, 751-752 (8th Cir. 2016), petition for cert. pending, No. 16-757 (filed Dec. 12, 2016). This Court should do the same.

4. In the wake of respondent's brief, it is now clear that respondent has suffered no injury in fact and thus

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[3] Respondent contends (Br. 36) that, even if the allowance of a claim for a time-barred debt has no immediate impact on the debtor, it may eventually have an impact because many Chapter 13 cases fail. But a substantial percentage of those cases are refiled or converted to Chapter 7, where the allowance of an additional claim will ordinarily have no impact. See Ed Flynn, *Bankruptcy by the Numbers: Chapter 13 Case Outcomes by State*, Am. Bankr. Inst. J., Aug. 2014, at 40, 78.

lacks Article III standing. Respondent does not identify any injury that she actually incurred or that this suit could redress. In particular, respondent does not assert that she suffered any harm from her bankruptcy attorney's filing the one-sentence objection to petitioner's claim.

Instead, respondent contends only that she has standing because petitioner's conduct "imposes a real risk of actual harm." Br. 37. But a "threatened injury must be certainly impending" to qualify as an Article III injury in fact. *Clapper* v. *Amnesty International USA*, 133 S. Ct. 1138, 1147 (2013) (citation omitted). By the time respondent filed her FDCPA suit, any threatened injury, far from being "certainly impending," had completely evaporated: *the bankruptcy court had disallowed petitioner's claim.* See J.A. 5, 10. Contrary to the government's suggestion (Br. 29), it is thus academic whether "respondent would * * * have suffered any harm if petitioner's claim had been allowed"; petitioner's claim *was not* allowed, and respondent thus *did not* suffer any harm.[4]

Nor is respondent's lack of standing anomalous. The same problem appears to exist in the three other cases in which petitions for certiorari on the same questions are currently pending. See *Nelson*, *supra*; *Dubois*, *supra*; *Owens*, *supra*. And if there were ever a case in which a claim was allowed *and* the debtor suffered an identifiable injury (for example, because the debtor had a 100% repayment plan), an FDCPA action would likely be precluded, because the debtor would impermissibly be collaterally challenging the bankruptcy court's decision to allow the

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[4] To the extent respondent focuses on the "risks and costs" that she says are imposed on *other debtors*, Br. 37, those are plainly insufficient to confer standing on *her*. See, *e.g.*, *Blum* v. *Yaretsky*, 457 U.S. 991, 999 (1982).

claim. See 4 *Collier on Bankruptcy* ¶ 502.02[3][d], at 502-16.

In short, the absence of an injured plaintiff—both here and in many other cases—reflects the lawyer-driven nature of the proposed cause of action. And the absence of standing is an additional reason to overturn the decision below.

C. To The Extent The FDCPA Could Be Read To Prohibit Filing A Proof Of Claim For An Unextinguished Time-Barred Debt, The Bankruptcy Code Precludes Such Application Of The FDCPA

Finally, even if the FDCPA could be interpreted to prohibit petitioner's conduct, the Bankruptcy Code would preclude that application of the FDCPA. Respondent offers only the briefest of responses to petitioner's arguments on that score, and her response lacks merit.

Respondent contends that the Bankruptcy Code and the FDCPA are "capable of coexistence." Br. 49 (citation omitted). That is true—but not under respondent's (and the Eleventh Circuit's) interpretation of the FDCPA. As respondent reads the two statutes, they do not "complement each other," *POM Wonderful LLC* v. *Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014); instead, one statute (the Bankruptcy Code) creates a right to engage in conduct that the other (the FDCPA) prohibits. The mere fact that a debt collector could choose not to file a proof of claim is of no moment; a conflict exists because the Code "entitle[s]" a debt collector to take that action. *Travelers*, 549 U.S. at 449. Respondent does not dispute that the FDCPA is at best ambiguous on the question presented here. For that reason, the Court should construe the FDCPA to avoid a conflict with the Code.

Respondent does not so much as mention any of this Court's decisions cited in petitioner's opening brief on the issue of conflicting federal statutes, other than to deride

as "dicta" the Court's discussion of the issue in *Kokoszka* v. *Belford*, 417 U.S. 642 (1974). See Br. 51 n.42. But that is incorrect, and *Kokoszka*'s reasoning is on all fours here. There, the Court recognized that the Consumer Credit Protection Act and the bankruptcy laws must be interpreted to "coexist." See 417 U.S. at 650. And because the CCPA was concerned not with "the *administration* of a bankrupt's estate," but rather with "the *prevention* of bankruptcy in the first place," the Court construed the relevant CCPA provision to apply only outside bankruptcy proceedings, leaving it to the Bankruptcy Act to provide "protection and remedy" to a debtor *within* bankruptcy—even though the CCPA was actually the later-enacted of the two statutes. *Id.* at 650-652.

The same reasoning applies *a fortiori* here, where the FDCPA was the earlier-enacted statute. Like the CCPA—the statute to which the FDCPA was appended—the FDCPA was intended to prevent bankruptcy, not to regulate it. To the extent respondent raises policy concerns about "the *administration* of a bankrupt's estate," that is a matter to be addressed by Congress or the Advisory Committee in regulating the "delicate balance" of the bankruptcy system. *Kokoszka*, 417 U.S. at 651. In an effort to address those perceived policy concerns, the Eleventh Circuit improperly extended the FDCPA into the domain of the bankruptcy laws. Its interpretation of the statute is untenable, and its judgment should therefore be reversed.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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